UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

MFP FIRE PROTECTION, INC.,
Respondent

and **27-CA-13246**

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U. A., AFL-CIO,
Charging Party Union

Michael T. Pennington, Esq.,
for the General Counsel
James C. Fattor, Esq.,
for the Respondent
William W. Osborne, Jr., Esq.,
for the Charging Party Union

SUPPLEMENTAL DECISION [1]

Albert A. Metz, Administrative Law Judge. This is a compliance case where the issues center upon the Respondent's liability for payments to several of its employees and certain contractual benefit funds. On August 28, 1995, the National Labor Relations Board (Board) issued its Decision and Order in this case (318 NLRB 840) directing that the Respondent shall, in pertinent part, 1) restore and apply to its bargaining unit employees the wages, hours, and other terms and conditions of employment established by the 1991-1994 collective-bargaining agreement (Agreement) with the Union until such time as Respondent fully discharges its recognitional and bargaining obligations to the Union by bargaining in good faith to agreement or lawful impasse; 2) make whole its bargaining unit employees for any financial losses they may have suffered as a consequence of the Respondent's unilateral changes in the terms and conditions of employment made on or after April 1, 1994; and 3) make whole the National

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1 This matter was heard at Denver, Colorado on February 25 - 26, 2003, at which point the hearing was adjourned to permit the parties to agree on certain stipulations. That stipulation was subsequently submitted and approved by the undersigned. The hearing was closed on April 30, 2003. The parties filed their briefs on July 7, 2003.

Automatic Sprinkler Industry (NASI) health and welfare and pension trusts established under the Agreement for any losses suffered as a consequence of the Respondent's unilateral discontinuance of contributions to those trusts on and after April 1, 1994. On December 3, 1996, the United States Court of Appeals for the Tenth Circuit entered its judgment enforcing the Board's Order, ***MFP Fire Protection, Inc. v. NLRB***, 101 F.3d 1341 (10th Cir. 1996).

A controversy having arisen over the amount of backpay due under the Board's Order, the Regional Director issued a compliance specification on February 6, 1998, and an amended compliance specification on December 15, 2000. Following the Respondent's answer to the amended compliance specification, General Counsel filed with the Board a Motion to Strike Respondent's Answer and for Summary Judgment. On February 22, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 31, 2002, the Board issued a Supplemental Decision and Order (337 NLRB No. 155) which denied the General Counsel's motion and remanded the proceeding to the Regional Director for the purpose of scheduling a hearing concerning the issues raised in the amended compliance specification. The Regional Director subsequently issued a second amended compliance specification which was the subject of the present hearing.

The Parties reached various stipulations and agreements relative to the issues in this compliance matter. There are, however, three issues that the Respondent raises in its brief concerning its backpay liability:

1. Whether the backpay period covered by the Board's order ended on September 11, 1997, because the parties' negotiations were at a lawful impasse.

2. Whether Respondent's employees Michael Caine Lee, John Musso, and Randy Simco performed work covered by the 1991-1994 Association Agreement.

3. Whether the NASI benefit funds are entitled to liquidated damages and interest on Respondent's delinquent contributions.

I. THE DISPUTED BACKPAY PERIOD

The Parties disagree as to the appropriate cut-off date for calculating backpay liability. The background of the matter starts with the Board's order which directed: "The Respondent must fully restore to its bargaining unit employees the wages, hours, and other terms and conditions of employment they enjoyed immediately before the Respondent made unlawful unilateral changes in those areas . . . ." The enforced order also requires that Respondent, "[u]ntil such time as it shall have fully discharged its recognitional and bargaining obligations to the Union, fully restore and apply to its bargaining unit employees the wages, hours, and other terms and conditions of employment established by the 1991-1994 Association Agreement."

In a letter dated September 7, 1995, the Union requested that Respondent recognize the Union as the exclusive bargaining representative for its bargaining unit employees, restore the terms and conditions of employment under the expired contract, make its employees whole for lost wages and benefits, and meet and negotiate in good faith with the Union for a new contract.

Union representative Max Jenkins testified that the Union never received a reply to this demand letter.

After the Court of Appeals enforced the Board's order the parties did agree to meet for negotiations. In the summer of 1997 the Union, represented by Jenkins, and the Respondent, represented by attorney, Rita Kittle, met on six or seven occasions but no agreement had been reached by September 11, 1997.

On September 12, 1997, Kittle wrote the Union as follows:

> Attached …is the last, best, and final offer which we extended on behalf of [the Respondent] in our negotiation session yesterday….The Union rejected this offer and declared an impasse, without presenting the offer for a vote of the employees.
>
> MFP will implement its last, best, and final offer effective today. Please advise us of the Union's position regarding commencement of apprenticeship for the three individuals presently employed as laborers.

Jenkins testified without contradiction that during negotiations the Respondent made no proposals other than those in the September 11, 1997, final offer. The Respondent's offer did not alter the employee classifications of Apprentice and Journeyman, but rather left the employee classifications of the 1991-1994 agreement in place.

On September 30, 1997, Jenkins wrote to Kittle stating that Respondent's employees were not eligible to participate in the Union's apprenticeship program because the Respondent was not then a signatory to a collective-bargaining agreement with the Union. Jenkins also stated that it was the Union's position that "the employees you generally label as 'laborers' are not eligible for the apprenticeship program because, in reality, they are journeymen sprinkler fitters and must be classified accordingly in any agreement between…" the Union and the Respondent.

The Respondent did not reply to this letter until June 1, 1998, when Kittle addressed a letter to Jenkins stating that the Respondent wanted to reopen negotiations and discuss particularly wages and apprenticeship. There is no evidence that the Union received this letter. Jenkins testified he did not recall ever seeing that letter. In a letter addressed to Jenkins dated July 20, 1998, Kittle informed the Union of the Respondent's intention to implement it June 1 proposed changes effective July 27, 1998. Jenkins testified that he did not recall ever seeing that letter either. Regardless of the receipt the June 1 and July 20 letters by the Union, the Government conceded that the appropriate backpay period ended on July 27, 1998.

The Respondent argues that the parties were at an impasse on September 12, 1997, and all backpay figures should be calculated using that date. The Government asserts that there was no evidence of a legal impasse being reached in September 1997 and has used the July 27, 1998, date as the termination date for assessing backpay liability. More specifically the Government asserts that the gross backpay period ended July 27, 1998, based upon its judgment that the Respondent was privileged to implement its proposed wage rate for the "helper" classification on

that date thereby rectifying a critical missing term to its final offer of September 11, 1997, i.e. leaving its "laborer" employees out of the negotiations.

The Government makes the argument that the Board's remedy only permits the Respondent to deviate from the wages established by the expired collective-bargaining agreement to the extent that such changes are consistent with its last offer before a lawful impasse. The Respondent's last offer before September 11, 1997, includes wage rates for the classifications of journeymen and foremen but does not contain a wage rate for "helper" or "laborer." Respondent's final offer did include a proposal to participate in the Union apprenticeship program but that was not viable because the Respondent was not signatory to a Union agreement. The Government points out, moreover, that the final offer contained no contingent proposal to pay its laborers as if they were apprentices in the event Respondent could not participate in the Union apprenticeship program. "Thus, even assuming a lawful impasse existed on September 11, 1997, Respondent was still not permitted on that date to implement a new wage rate for its bargaining unit employees referred to as 'helpers' or 'laborers' because that change was not consistent with its last offer before impasse. Therefore, the record evidence fails to establish that the backpay period should end on September 12, 1997." (GC Brief, p. 23)

The Regional Office Compliance Officer, Erika K. Bailey, testified as to the Government's position regarding the termination date. She stated that the September 1997 date was not used because it was determined that a legitimate impasse had not been reached on that date. She also testified that the backpay of employees whom the Respondent classified as "laborers" was calculated on the basis that they were journeymen. This determination was made after concluding that they performed journeymen work and the only two categories of employees listed under the Agreement were foreman and journeyman. The Respondent admittedly did not propose to change these classifications until its June 1, 1998, letter to the Union. This ultimately led to what the Government concedes was the cutoff date of July 27, 1998, when the Respondent implemented its offer.

The record evidence does not reflect any detailed facts as to what occurred at the negotiations leading up to the alleged impasse in September 1997. The Respondent's letter of September 12 states the Union declared an impasse at the September 11 meeting. Jenkins in his testimony did not deny the Union declared that an "impasse" had been reached at that meeting. Jenkins did, however, reply to Kittle's letter stating that apprenticeship was still an issue because the Respondent was not a signatory to an agreement with the Union. He also took the position that the "laborers" were in reality journeymen entitled to journeymen pay. Moreover, the Respondent's last offer of September 11, 1997, only includes wage rates for journeymen and foremen. That offer did not address the issue of its unit employees covered by the Board's order that the Respondent classified as "laborers." Moreover, the Respondent's final offer contained no alternative proposal to pay its laborers as if they were apprentices in the event Respondent could not participate in the Union apprenticeship program. In effect the "laborers" (although performing unit work as discussed below) were not dealt with by the Respondent in its final offer. The Respondent did not reply to the Union's September 30, 1997, letter until June 1998 when it wrote the Union that it was willing to negotiate about the outstanding issues involving apprentices and wages.

The General Counsel has the burden of proving the amount of gross backpay due in compliance proceedings. ***Arlington Hotel Co***., 287 NLRB 851, 855 (1987), enfd. on point 876 F.2d 678 (8th Cir. 1989). In discharging the Government's burden, the General Counsel has discretion in selecting a formula which will closely approximate the amount due. The Government need not find the exact amount due nor adopt a different and equally valid formula which may yield a somewhat different result. ***NLRB v. Overseas Motors***, 818 F.2d 517 (6th Cir. 1987); ***Kansas City Refined Helium Co.***, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982). The employer who committed the unfair labor practices has the burden to establish facts that reduce the gross backpay amount. ***Florida Tile Co***., 310 NLRB 609 (1993). Thus, the burden of showing that the backpay period ended in September 1997 because of an impasse falls to the Respondent because it would reduce the gross backpay amount. Additionally, the burden of proof rests on the party asserting that impasse exists. ***North Star Steel Co.***, 305 NLRB 45 (1991); ***Roman Iron Works***, 282 NLRB 725 (1987). By definition, an impasse occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. ***Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete***, 484 U.S. 539, 543 (1988). Whether a bargaining impasse exists is a matter of judgment. Evidence concerning the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. ***Taft Broadcasting Co.,*** 163 NLRB 475, 478 (1967), enfd. sub nom. ***Television Artists AFTRA v. NLRB***, 395 F.2d 622 (D.C. Cir. 1968); ***Grand Auto***, 320 NLRB 854, 857 (1996). After a lawful impasse has been reached on one or more subjects of bargaining, an employer may implement any of its pre-impasse proposals. ***Western Publishing Co.***, 269 NLRB 355 (1984).

The lifeless record of the Parties' negotiations summarized above is minimally enlightening in determining if a legitimate impasse was reached. There is inadequate record evidence of the crucial factors cited in ***Taft*** that are necessary to assess whether an impasse occurred. There simply was no showing that in September 1997 it would have been fruitless to continue negotiations. In sum, I conclude that the Respondent has failed to meet its burden of proving that a legitimate impasse was reached on September 11, 1997. ***Elf Atochem North America, Inc.***, 339 NLRB No. 93 slip op. at 14-15 (2003). Based on the record as a whole, I further find that the Government has sufficiently proven that July 27, 1998, is an appropriate date for calculating backpay liability in this case.

II. WORK OF MICHAEL CAINE LEE, JOHN MUSSO AND RANDY SIMCO

The Respondent argues that regardless of the backpay period its "laborer" employees should not be compensated as set forth in the Compliance Specification. The Respondent argues that employees Michael Caine Lee, John Musso and Randy Simco "were not doing bargaining [unit] work for the first six months of their employment." (R. Brief p. 8) The Respondent's position is that these employees were "laborers" who did not perform work covered by the collective-bargaining agreement, were never put into the Union's apprenticeship program and, thus, are not entitled to compensation under the Board's order. The Government counters that the

three disputed employees were not working as laborers but rather as journeymen and the Agreement requires their backpay be calculated on that basis.

Article 18 of the 1991-1994 Association Agreement describes the work covered by that agreement as "the installation, dismantling, maintenance, repairs, adjustments, and corrections of all fire protection and fire control systems including the unloading, handling by hand, power equipment and installation of all piping or tubing, appurtenances and equipment pertaining thereto . . . ." (GC Exh. 3, p. 18).

Additional unit work is also set forth in Addendum A of the agreement and relates to fire protection work:

> The laying out and cutting of all holes, chases and channels, the setting and erection of bolts, inserts, stands, brackets, supports, sleeves, thimbles, hangers, conduit and boxes used in connection with the pipe fitting industry.
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> ***
>
> Laying out, cutting, bending and fabricating of all pipe work of every description.
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> ***
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> The handling and using of all tools and equipment that may be necessary for the erection and installation of all work and materials used in the pipe fitting industry. (GC Exh. 3, p. 29).[2]

A. Randy Simco

Simco began employment with the Respondent in January 1997 and was still working for the Respondent at the time of the hearing. He testified that his work during the backpay period included cutting holes in ceilings for pipe hangers, threading pipe, loading and unloading pipe, cutting pipe, dumping and refilling barrels of water used when testing the sprinkler system, and helping install pipe. He recalled that he began installing pipe on his third day working for the Respondent. Simco testified that the only cleaning and sweeping work he performed occurred when work in a particular area was completed and all the employees would devote from 45 to 60

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2 The Government asserts that Respondent's employees Brian Bresciani, Chandler Canterbury, Robert Dick, and Morgan Hiser, performed work covered by the 1991-1994 Association Agreement and are entitled to journeyman backpay under the Board's order. The Respondent's brief does not argue to the contrary. Several witnesses testified as to the work performed by these employees. In sum, that testimony, which I credit, overwhelmingly demonstrated that these men regularly did the work of journeymen as set forth in 1991-1994 Agreement. This evidence was not seriously contested by the Respondent. I conclude that Brian Bresciani, Chandler Canterbury, Robert Dick, and Morgan Hiser are entitled to journeymen compensation under the Board's order.

minutes cleaning tasks. Simco worked for the most part during the backpay period with the Respondent's sons, Jason (Jay) and Jeff Martin. He noted that Jeff Martin was his foreman. Neither Jay nor Jeff Martin testified at the hearing.

Musso testified that he observed Simco do "[t]he same things we all did. It was kind of a revolving deal…. A lot of times a guy would come in and thread a piece of pipe … or several pieces of pipe, go hang it, another guy would come and jump right on the same machine…. It was just a lot of work at the time…."

Larry Martin, the Respondent's owner, testified that he hired Simco to cut slots in dry wall ceilings so pipe could be installed and to clean up in work areas. Martin stated that he believed persons he hired as "laborers" loaded and unloaded pipe from trucks at jobsites. Cutting pipe channels and loading and unloading materials is work specifically covered by the Agreement. Martin recalled he hired Simco at a "laborer rate." He remembered talking to Simco about getting into the apprenticeship program some time after his hire because Simco "felt that he would like to get into the trade after he was working with my son, and we discussed with him then that we would try to get him into the apprenticeship program if possible." Larry Martin testified he never observed what work Simco actually did on the job.

Simco's testimony concerning his work was called into question by two affidavits he signed during the course of this case. These affidavits and one attested to by Musso are discussed below.

B. John Musso

Musso worked for the Respondent from approximately April through December 1997. He testified that when he was hired, Larry Martin told him that he would be helping journeymen and learning how to install fire sprinkler systems. Musso testified that his daily work included unloading and setting up the power threading machine, threading pipe, cutting pipe, drilling holes for all-thread pipe hangers, attaching hangers to the ceiling, hanging the pipe, doing repairs, and fixing leaks. Musso stated that the clean-up work he did occurred at the end of the workday and required from 30 to 60 minutes. He also recalled that the last two months he worked for the Respondent he worked with the owner's son, Jason Martin.

In late December 1997 Musso noticed that his pay check was approximately a dollar per hour less than it had been previously. He asked Larry Martin about the shortage and was told that it had something to do with a government adjustment. Musso was very dissatisfied with the reduced pay but went to work at a commissary project where he worked with Jason Martin. After lunch that day Jason started assigning Musso to do some threading and pipefitting work. Musso, peeved by the pay cut, told him, "I'm just a laborer; I can't do that work anymore. We're down [listed] as laborers anyway, so let's start acting the part." Jason told him if he felt that way he should see his father. Musso then went to the Respondent's shop and confronted Larry Martin about the matter. He told Martin he "was tired of getting paid laborer's scale wages when I was doing journeyman scale work, and was upset about the fact that I had been there nine months and working my tail off and …I wanted something to start happening with the promise he made me about getting me in an apprenticeship program. [Martin said] he was having problems with the

Union, and he couldn't afford to give anybody a raise at that time…." Because they could not resolve the matter Larry Martin laid Musso off. Larry Martin did not mention this discussion with Musso during his testimony. He did testify that he could not recall any discussions with Musso about the apprenticeship program. Jason Martin did not testify at the hearing. Based on demeanor of the witnesses, the lack of direct controverting evidence from the Respondent and the record as a whole, I credit Musso's testimony that he did have the noted conversations with Jason and Larry Martin.

Larry Martin testified that he could not remember what he discussed with Musso when he hired him about what his job duties would be. He did recall that Musso was hired as a "laborer, helper." Martin testified with regard to Musso he was "assuming" that Musso's duties would involve cleanup and moving pipe around.

C. Michael Caine Lee

Michael Caine Lee did not testify at the hearing. Musso, however, testified that he worked on several jobs with Lee and observed the work tasks performed by Lee. Musso observed Lee cutting, threading, and hanging pipe.

Simco testified that he worked on various projects with Lee and observed his work. Simco noted that Lee threaded pipe with the power machine, carried pipe, installed sprinkler pipe, loaded and unloaded equipment and machines from trucks, and helped clean up at the end of the workday the same as the rest of the employees.

The testimony concerning Lee's work is unchallenged by the Respondent who offered no evidence that disputed the foregoing description of his work assignments. Larry Martin testified that he had no recall of hiring Lee or even for which project he was employed.

D. The Affidavits Signed by Simco and Musso

Rita Kittle was serving as Respondent's attorney in 1997-1998. She testified that she had Lee, Musso and Simco review the relevant parts of the collective-bargaining agreement and sign affidavits she had prepared regarding whether they performed sprinkler fitter work under the Agreement. Simco and Musso's affidavits prepared by Kittle were introduced into evidence.

Simco admitted that he actually signed two affidavits – one prepared by Kittle and another prepared by a Board agent. The affidavit produced by Kittle was executed on June 4, 1997. In this document Simco stated that he was employed by the Respondent as a laborer, and that his primary duties were "to sweep up and keep the work area clean [,]" and to "get tools and materials for the sprinklerfitter when asked." Simco's 1997 affidavit also states that he did not perform "any installation, dismantling, maintenance, adjustments, or corrections of fire protection or fire control systems…." and that he also did not perform any of the work described in Addendum A to the 1994 agreement.

Simco testified that around the date of the 1997 affidavit he was told to go the shop to speak to "some woman" on the telephone. He had an approximately two or three minute

conversation with the woman regarding his job duties with the Respondent. He subsequently was presented with the June 4 affidavit and went with Respondent's co-owner, Elizabeth Martin, to the company's bank where he had his signature acknowledged by a notary public. Simco testified that the statements contained in the affidavit about his work duties were not true and that he only signed the affidavit because he wanted to keep his job. Simco's affidavit confirmed that owner's son, Jeff Martin, was usually his foreman.

Simco executed the second affidavit on January 27, 1998, before a Board agent investigating the case. Simco stated in this affidavit that he did thread, install, and measure pipe for the Respondent. He claimed, however, that he did not begin doing such work until mid-July 1997. Simco testified that some of the statements in this second affidavit were likewise not true. Simco was still employed by Respondent when he gave the statement to the Board agent.

Musso acknowledged that he also signed an affidavit for the Respondent concerning his work duties that stated he did not perform sprinkler fitter work. Musso testified that his affidavit was untrue and that he had only signed it because he had been laid off from other employment, had just started working for the Respondent and, "I figured if I didn't play along, they'd find some way to get rid of me." Musso's affidavit notes that he worked under the supervision of Jason, Jeff and Larry Martin.

It is very troubling that Simco and Musso would sign sworn affidavits that they subsequently testified misstated their work duties. Such conduct demonstrates a propensity to disregard the truth. I weigh that inclination against their stated self-preservation motivation of protecting their jobs. In Simco's case I also have taken into consideration the fact that he is still employed by the Respondent and that his testimony is contrary to the interests of the Respondent in this proceeding. I have likewise considered the demeanor of these witnesses while testifying. It is noted that the evidence concerning Lee's duties was not challenged by the Respondent. In determining these three men's duties I have also closely examined the Respondent's evidence. That evidence is weak. Larry Martin could not testify as to what work the three men actually did on the job. He did testify, however, that part of the work he intended Simco to do included cutting channels and that all laborers did load and unload pipe -- tasks covered by the Agreement. The record also shows that all three regularly worked with his sons Jason and Jeff Martin but the Respondent did not call either of these immediate family members to testify and offered no explanation for their failure to testify.

Under the adverse inference rule "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." ***International Automated Machines***, 285 NLRB 1122, 1123(1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988); ***Auto Workers v. NLRB***, 459 F.2d 1329 (D.C. Cir. 1972). I find that it is reasonable to assume that Jason and Jeff Martin would be favorably disposed to their parents' interest in this case. I infer that had Jason and Jeff Martin testified their testimony would have been contrary to the Respondent's defense that Lee, Musso and Simco did not do journeyman work during the backpay period. ***Daikichi Corp. d/b/a Daikichi Sushi,*** 335 NLRB No. 53, slip op. 1-2, (2001).

The fact that the Respondent classified workers as laborers does not decide the issue of the work they actually performed. ***Scapino Steel Erectors, Inc.,*** 337 NLRB No. 158, slip op. at 2 (2002) (Respondent's job classifications at variance with the classifications in the collective bargaining agreement not dispositive.) I find that the Respondent has failed to offer sufficient evidence to show what work Lee, Musso and Simco performed. I further find that the testimony of Simco and Musso was ultimately credible and persuasive that they and Lee did journeyman work as defined in the Agreement during the backpay period. I credit the testimony of Simco and Musso that they misstated their duties in the affidavits in an effort to protect their employment. ***Shen Automotive Dealership Group,*** 321 NLRB 586, 589 (1996); ***NLRB v. UniversalCamera Corp.***, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951) ("nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony.) Accord: ***General Fabrications Corp***., 328 NLRB No. 166, slip op. at 1 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). I find that the Respondent has failed to meet its burden of overcoming the evidence that Lee, Simco and Musso did journeyman work and therefore conclude that the Respondent is liable for making them whole at the journeymen rate.

In making the finding these men did journeymen work I note that under the Court's enforcement order, the Respondent was legally required to compensate employees performing bargaining unit work at the contractually established wage rates. The Respondent's September 11, 1997 last offer did not contain a proposal to alter the wages and classifications contained in the 1991-1994 Agreement. To the extent that Musso, Lee and Simco might be viewed as inexperienced workers, I note the Respondent's final offer made no proposal for creating a "laborer" or "helper" designation and corresponding wage rate. The Respondent never proposed including language in a new collective bargaining agreement concerning "helpers" until its June 1998 offer to the Union. With regard to apprentices, Article 4 of the Agreement states:

> A person not a member of the United Association shall be acceptable for employment as an Apprentice after he has met the requirements in the Apprentice Standards, been accepted by the Joint Apprenticeship and Training Committee and issued a probationary Apprentice classification card by the Director of Apprenticeship of Local 669. If the Union is unable to furnish men to the Employer, and the Employer employs men not members of the United Association, these employees shall be paid the Journeyman's rate provided in the Agreement and contributions shall be made on such employees to the various fringe benefit funds as provided in this Agreement. (GC Exh. 3, p. 5)

Thus, Article 4 of the Agreement requires that all employees performing work under the Agreement must be paid journeyman wages and benefits, regardless of where those employees were obtained or their qualifications. The only exception is an employee who has been admitted into the Union apprenticeship program and issued an apprenticeship card by the director of apprenticeship. [3] Under the terms of the Agreement, since the Respondent was not a signatory to

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3 The 1991-1994 Agreement provides three categories of wage rates: Foreman (Article 7), Journeyman (Article 9), and Apprentice, (Article 17). The term "Apprentice" is defined in Article 4 of the Contract,

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any agreement with the Union, it was precluded from participating in the designated apprenticeship program or paying "laborers" an apprentice wage. In sum, the proper compensation for Lee, Simco and Musso is the journeyman rate since the Respondent was not entitled to pay them an apprenticeship wage under the terms of the Agreement. ***McKenzie Engineering Co.***, 336 NLRB No. 26 (September 28, 2001), slip op. at 10; ***L.B. Priester & Son, Inc.,*** 252 NLRB 236, 237 (1980), enfd 669 F.2d 355 (5th Cir. 1982).

The Respondent's January 13, 2003 Answer states that employee Steven Brady, "was hired after the company was beginning to reach an impasse and he was paid pursuant to the Company's last best offer of September 11, 1997[,]" The Respondent's post-hearing brief does not discuss Brady. As I have found that no impasse existed on September 11, 1997, as well as the other reasons discussed above relating to why employees are entitled to journeyman pay, I conclude that Brady is entitled to backpay and other compensation pursuant to the 1991-1994 journeyman rates through the date the backpay period ended.

There is no dispute regarding the classification for purposes of wage rates of any other employees. Respondent agreed at the hearing to amend its answer to admit that Albert Bresciani, Ralph Caudill, and Robert Haskell worked as foremen and were entitled to foreman's wages at all times. Mark Bovey's classification as an apprentice is also undisputed. Although Respondent denied that Kenneth Newman and Arthur Padmore were foremen, the issue is moot since neither is alleged to have backpay due and their job classification does not affect the total hours they worked for purposes of determining benefit fund contributions due on their behalf.

In sum, I find that the record evidence establishes that Brian Bresciani, Chandler Canterbury, Robert Dick, Morgan Hiser, Steven Brady, Randy Simco, Michael Caine Lee, and John Musso are all entitled to be compensated under the 1991-1994 Association Agreement's journeyman rates for the backpay period as set forth in the Compliance Specification.

III. THE NASI BENEFIT FUNDS

The Board's enforced order requires that Respondent: "make whole the health and welfare and pension trusts established under the 1991-1994 Association Agreement (NASI funds) for any losses those trusts suffered as a consequence of the Respondent's unilateral discontinuance of contributions to those trusts on and after April 1, 1994." Footnote 10 of the order mandates that, "Any amounts that the Respondent must pay to the trusts to satisfy this

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which places the following qualifications and limitations on employees before they can be considered Apprentices under the terms of that Agreement:

> [a] person not a member of the United Association shall be acceptable for employment as an Apprentice after he has met the requirements in the Apprenticeship Standards, been accepted by the Joint Apprenticeship and Training Committee and has been issued a probationary Apprentice classification card by the Director of Apprenticeship of Local 669.

The Respondent was never enrolled in the Union's apprenticeship training program at any time relevant to this proceeding.

remedy are to be computed at the compliance stage, consistent with directions in ***Merryweather Optical Co.***, 240 NLRB 1213 (1979)."

Merryweather Optical discusses the controlling documentation for determining amounts owed to benefit funds:

> We leave to the compliance state [stage] the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. 240 NLRB 1213, 1216 fn.7 (1979).

The Respondent contests the payment of liquidated damages in relation to any liability it incurred relative to its failure to pay funds under the Agreement. (The accuracy of the amounts in question has been stipulated by the Parties and is not in dispute.) The Respondent concedes that all but the welfare fund "have specific provisions for the collection of liquidated damages and one can only assume that the trustees of the welfare fund did not wish to impose such liquidated damages." (Resp. Brief, p.11) The Government asserts that the Agreement and relevant fund documents provide for liquidated damages and interest.

The 1991-1994 collective-bargaining refers to the document governing each of the funds at issue as the "existing Agreement and Declaration of Trust" and permits the trustees of each fund to take appropriate action to collect delinquencies. (GC Exh. 3, pp. 18-21). John Eger, assistant administrator of the NASI Welfare, Pension, Education, and Supplemental Pension Trust Funds identified and testified concerning the trust documents. (GC Exhs. 15-18).

The Agreement and Declaration of Trust for the Sprinkler Industry Supplemental Fund has a First Amendment, at pages 2-3 with provisions that provide for liquidated damages and interest for delinquent contributions made to the fund and provide for twelve percent interest and liquidated damages of twenty percent on payments "not received by the 15th day of the month following the month in which payment is due." (GC Exh., 15) The Agreement and Declaration of Trust for the National Automatic Sprinkler Local 669 UA Education Fund sets forth at pages 26-27 the provisions providing for liquidated damages and interest for delinquent contributions made to this fund. (GC Exh. 17) Both of these documents contain a provision permitting the Trustees to adopt "such additional rules and regulations to enforce the collection of delinquent contributions as they may deem necessary."

The provisions for liquidated damages and interest for delinquent contributions made to the National Automatic Sprinkler Industry Pension Fund and the National Automatic Sprinkler Industry Welfare Fund are contained in the Guidelines for Participation of Contributing Employers in the Sprinkler Industry Trust Funds. (GC Exhs. 19 and 20.) Eger testified these guidelines were promulgated and adopted by the Trustees of these Funds pursuant to the authority vested in them by the governing documents for each Fund, and were effective and

binding at all times relevant to this litigation. The Agreement and Declaration of Trust agreements for the Pension Fund and the Welfare Fund allow interest to be assessed at "the highest rate permitted by the laws of the state where suit is instituted." (GC Exh. 16, First Amendment, p. 2; GC Exh. 18, Second Amendment, p. 2) Both of these documents also contain a provision permitting the Trustees to adopt "such additional rules and regulations to enforce the collection of delinquent contributions as they may deem necessary." (GC Exh. 16, First Amendment, p. 2; GC Exh. 18, Second Amendment, p. 2)

Eger testified concerning two documents entitled "Guidelines for Participation" which were in effect at all times during the backpay period and set forth contribution rules adopted by the fund trustees, pursuant to authority granted to them by the trust documents. The referenced guidelines apply to all the relevant trust funds, are provided to each participating contractor, and contain provisions for liquidated damages and interest on delinquent fund contributions.

The record evidence reveals that the Respondent has previously paid liquidated damages and interest. In April 1994 the Respondent was assessed 20 per cent liquidated damages and 12 per cent interest rates for a tardy funds contribution. The Respondent paid the liquidated damages and interest on September 12, 1994.

The record shows that liquidated damages and interest are set forth in the relevant trust documents and the Respondent has paid liquidated damages and interest for its past delinquencies. I, therefore, reject the Respondent's arguments that liquidated damages are not required by the funds or have no reasonable relationship to the actual damages incurred by the funds. The Board has commonly required the payment of liquidated damages where appropriate. ***Hawk of Connecticut, Inc.,*** 319 NLRB 1213 (1995); ***Harris Glass Industries, Inc.,*** 317 NLRB 595 (1995); ***Emsings Supermarket, Inc.,*** 307 NLRB 421, 423 (1992); ***American Thoro-Clean Ltd.,*** 283 NLRB 1107, 1109-10 (1987). I also find the Respondent's suggestion that state law should be controlling on the issue of liquidated damages is without merit. The Supreme Court has endorsed the Board's exclusive exercise of its remedial powers under the Act in order to avoid state interference with a national labor policy. ***Building Trades Council (San Diego) v. Garmon***, 359 U.S. 236, 244-245, 247 (1959). I conclude that the NASI funds are entitled to liquidated damages and interest on Respondent's delinquent contributions. I further conclude that the Government's second amended compliance specification (as amended and clarified by stipulations) is the proper calculation of all compensation due to the employees and NASI funds.

CONCLUSIONS OF LAW

1. The methodology used in calculating the second amended compliance specification was reasonable and the General Counsel has met the burden of showing the gross backpay.

2. Respondent has failed to meet its burden of establishing facts that would reduce the backpay period or otherwise diminish gross backpay beyond the amounts voluntarily admitted by the General Counsel.

3. The General Counsel has met the burden of showing the gross amounts owed to each of the NASI benefit funds on behalf of the bargaining unit employees named in the second amended compliance specification.

4. Respondent has failed to meet its burden of establishing facts that would eliminate liquidated damages and interest or otherwise reduce the gross amounts owed to each of the NASI benefit funds beyond the amounts voluntarily admitted by the General Counsel.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, MFP Fire Protection, Inc., its officers, agents, successors, and assigns, shall make the following payments in accordance with the National Labor Relation Board's Decision and Order in 318 NLRB 840, 843 (1995):

(a) Make whole the employees named in Appendix A of this decision by paying them the net backpay sums indicated, plus interest accrued to the date of payment, less the tax withholdings required by law; interest on such amounts to be computed as prescribed in ***New Horizons for the Retarded***, 283 NLRB 1173 (1987).

(b) Make whole the NASI fringe benefit funds by paying them the sums indicated in Appendix A, including liquidated damages, on behalf of the employees named in Appendix A of this decision and in accordance with the fund contribution hours set forth opposite their names; interest on such amounts to be computed at the rate of 12 per cent per annum, consistent with directions in ***Merryweather Optical Co***., 240 NLRB 1213 (1979).

Dated: August 12, 2003

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Albert A. Metz
Administrative Law Judge